JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1962

No. 1007

JOHN ARTHUR LUOMOLA,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY TO MEMORANDUM IN OPPOSITION TO PETITION FOR CERTIORARI

Morris J. Kaplan
150 Broadway
New York, N. Y.
Attorney for Petitioner

David G. Lubell and
Lubell, Lubell & Lubell
150 Broadway
New York, N. Y.
Of Counsel

Supreme Court of the United States

October Term 1962

No. 1007

JOHN ARTHUR LEWIS,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY TO MEMORANDUM IN OPPOSITION TO PETITION FOR CERTIORARI

This reply brief is submitted in response to the memorandum in opposition of the Solicitor General.

At the outset this Court should note that the Solicitor General does not contest the principles of constitutional law set forth in the Petition for Certiorari that a criminal defendant is entitled to counsel of his own choice (P.B. 6,9)* and that counsel for a defendant at the time of sentence is essential for the protection of the defendant's constitutional rights in a criminal case (P.B. 9-10).

The Solicitor General attempts to avoid the entire thrust of the important constitutional questions raised in the area of representation by counsel of a defendant accused of a crime by contending, *inter alia*, that petitioner was represented by his trial counsel at sentencing; that the only reason petitioner had for new counsel was to present two witnesses and that since petitioner received the minimum sentence no prejudice was shown (O.B. 5).

---

* "P.B." denotes the Petition for Certiorari and "O.B." denotes the Opposing Brief of the Respondent.

These arguments do not properly reflect the entire record." The trial counsel referred to was the Court appointed counsel whom petitioner had discharged and wanted to replace at sentencing by counsel of his own choice, and who had expressed a desire to withdraw (P.B. 21). At several points petitioner noted that the reason for retention of new counsel was to present motions directed at the legality of the conviction or the jurisdiction of the Court, in petitioner's layman's language "To show * * * legal cause why judgment should not be pronounced against this defendant" (P.B. 24; 26). And, of course, if the motions of petitioner's counsel of his own choice would go to the legality of the conviction or the jurisdiction of the Court to pronounce sentence then, the fact that petitioner may have received the minimum sentence is irrelevant.

More important, the argument of the Solicitor General would vitiate the fundamental principles above mentioned of the right of a defendant to have counsel of his own choice and the right to such counsel at the time of sentencing. These are rights which must remain inviolate if they are to retain their vitality. It is not for the Trial Judge, or the U. S. Attorney, or the Appellate Court to determine whether the petitioner could have been aided by counsel of his own choice at time of sentence. Only the defendant's counsel of his own choice is adequately equipped to determine whether there are, and the nature of, effective motions and procedures on behalf of the defendant. *Cf. Jencks v. United States*, 353 U. S. 657, 668-669. The very nature of our adversary system of justice requires that defendant's counsel be the sole determiner of the availability and merits of motions to be made on behalf of the defendant. To give credence to the Solicitor General's argument can only result in an erosion of the principles of right to counsel of one's own choice and the right to counsel at sentencing since such rights can not be made dependent upon what the United States or an appellate court may envision or conclude as to the defenses that such counsel could have raised on behalf

of his client. The very principle of the right to counsel is so important and fundamental as to foreclose any search by the Court as to the prejudice resulting from the denial of counsel. *Glasser v. United States*, 315 U. S. 60, 76.

CONCLUSION

For the reasons stated in the Petition for Certiorari and in this reply, a Writ of Certiorari should be granted to review the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

MORRIS J. KAPLAN,
Attorney for Petitioner.

DAVID G. LOBELL,
LOBELL, LOBELL & JONES,
of Counsel.